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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ISMAEL BELTRAN, Defendant and Appellant.	D073516 (Super. Ct. No. SCD269037)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed and remanded with directions to correct abstract of judgment.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Based on separate violent incidents against two different victims, a jury convicted Ismael Beltran of (1) one count of first degree murder, with a further finding that he

personally used a deadly and dangerous weapon (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1)); and (2) one count of elder abuse with force likely to produce great bodily injury or death (*id*., § 368, subd. (b)(1)).[1] Beltran was sentenced to prison for an indeterminate term of 25 years to life, and a determinate term of four years.

Beltran contends (1) the trial court prejudicially erred in allowing a psychiatrist to testify during cross-examination about the content of reports containing the observations and conclusions of other mental health professionals who interacted with Beltran in jail but did not testify at trial; (2) the trial court prejudicially erred in not instructing on involuntary manslaughter; (3) the trial court applied the incorrect legal standard in denying his motion to modify the conviction to second degree murder; and (4) the abstract of judgment contains a typographical error regarding the Penal Code provision pertaining to the weapon use enhancement, which should be corrected.

Except for the contention regarding the typographical error in the abstract of judgment, Beltran's arguments lack merit. We accordingly affirm the judgment and remand to the trial court for the limited purpose of correcting the typographical error in the abstract of judgment.

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1 Unless otherwise indicated all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Elder Abuse Crime*

Beltran, who was 22 years old at the time, was on a city bus on the afternoon October 10, 2016, when he attacked a fellow passenger, G.M., who was a man in his 70's and a stranger to Beltran. While calling G.M. a "pervert," Beltran punched G.M. 17 times, including in the face. Between some of the punches, Beltran exited the stopped bus, came back onto the bus, and then continued the assault. Beltran also did "a little dance" between the punches. After completing the assault, Beltran ran away. G.M. had no interaction with Beltran before the assault and was simply sitting in his seat. G.M. suffered injuries to his teeth and mouth, and abrasions, bumps and bruises on his body.

During Beltran's testimony, he stated that seeing G.M. on the bus made him feel "uncomfortable" and he "reacted harshly." According to Beltran he had been concerned about his children because he thought they were being mistreated "by whoever," and he "kind of connected two different problems together" and felt like G.M. was "perving out" on him and was keeping "tabs" on his children. Beltran stated that he remembered hitting G.M. but did not remember getting off and on the bus.

B. *The Murder*

Beltran had been living with his father (Father), in Father's apartment since approximately the beginning of 2016, but because of Beltran's strange and disrespectful behavior, in early October 2016, Father told Beltran he could no longer live there. Beltran left the apartment for several days, but he did not take all of his things with him.

At some point, Beltran called Father to ask if he could come back to live at the apartment, but Father said no.[2]

On the afternoon of October 11, 2016, Beltran returned to Father's apartment. In a phone call, Father told his ex-wife, O.C., that Beltran was being rude and yelling and throwing things, but that he was going to stand firm and insist that Beltran move out of the apartment. Father later called O.C. at approximately 4:30 p.m. and said that he had told Beltran to pack up his things and leave. As related by O.C., Father said that Beltran "was screaming like crazy and kicking the wall." Father was on the street in front of the apartment when he called, and was planning to go to the store, but he had told Beltran that when he came back to the apartment, he expected Beltran to be gone. Beltran did not leave the apartment before Father returned.

Shortly after 5:00 p.m., neighbors in the apartment complex started hearing loud bangs, thumps, and the shaking of walls and windows coming from Father's apartment. Neighbors also heard someone crying for help and saying "Stop, son," and "No, son, no." At one point, Beltran was seen coming out of the apartment and onto the front balcony, where he jumped up and down while holding onto the railing and screaming, "I love you" in Spanish.

After the incident had gone on for a few minutes, a neighbor yelled toward the apartment that the police were coming. Beltran ran out of the apartment, down the stairs,

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2 Our account of the interactions between Beltran and Father in the days before the murder is based in large part on the testimony of Father's ex-wife, O.C., who spoke to Father daily, including multiple times on the day of the murder, and in whom Father confided about his problems with Beltran.

and out of the apartment complex. He then immediately came back into the apartment complex, retrieved a shoe that had fallen off his foot, and returned back up the stairs into the apartment. Beltran stayed inside the apartment the second time for one or two minutes while, according to one neighbor, the apartment walls again began to shake. Beltran then ran back downstairs and left the apartment complex. One neighbor estimated that the entire incident lasted approximately 15 minutes.

After Beltran left the second time, neighbors looked into the apartment and saw Father on the floor. He was saying "help me," and was covered with blood. Paramedics arrived and transported Father to the hospital, where he was pronounced dead at 7:52 p.m. An autopsy showed that Father had been stabbed 26 times, and the majority of the stab wounds were in his torso. The murder weapon was a large kitchen knife that was later located on top of the apartment's refrigerator.

Beltran spent the night in the park, and then went to his mother's house the next day. Beltran's mother arranged for Beltran to surrender to the police on the night of October 12, 2016. Beltran resisted officers when they attempted to handcuff him and put him in the police car, and he was placed in a body wrap restraint. On the way to jail, Beltran repeatedly banged his head against the police car center partition. Beltran was aggravated and was yelling and screaming when booked into jail. Jail staff noted that Beltran had an abrasion on his cheek and redness on his chest during booking. Beltran was initially placed in a safety cell because he was considered to possibly be a danger to

himself, and was later moved to enhanced observation housing before being moved to the general jail population on approximately October 19, 2016.[3]

C. Beltran's Trial

An information charged Beltran with murder, including an allegation that Beltran personally used a dangerous and deadly weapon (§§ 187, subd. (a), 12022, subd. (b)(1)) arising out of his killing of Father; and one count of elder abuse with force likely to produce great bodily injury or death (§ 368, subd. (b)(1)) arising out of his assault on G.M. After the trial court found Beltran to be mentally competent, the matter proceeded to trial.

1. *Evidence About Beltran's Mental State*

One of the central issues at trial was whether Beltran suffers from a mental disease that caused him to unreasonably believe that Father was trying to kill him. The evidence on that issue consisted primarily of (1) the testimony of the defense expert witness, psychiatrist Dr. Alan Abrams; (2) evidence of Beltran's bizarre and paranoid behavior described in the testimony of other trial witnesses; and (3) Beltran's testimony describing his own state of mind both before and during the killing. Based on that evidence, defense counsel argued during closing that Beltran was guilty of voluntary manslaughter, instead of murder, on the theory that he acted in imperfect self-defense because his mental disease made him irrationally believe that Father was going to kill him and he needed to

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[3] The reports by the mental health professionals that Beltran contends should not have been allowed into evidence were created while Beltran was in a safety cell or in enhanced observation housing and was being evaluated in connection with those placements.

defend himself,[4] or at least that Beltran did not act with the premeditation and deliberation required for first degree murder.[5]

a. *Witness Testimony About Beltran's Strange Behavior*

Several witnesses testified about Beltran's strange behavior and change in personality in the years and months leading up to the killing.

i. *Testimony by O.C.*

O.C., who was Father's ex-wife and Beltran's former stepmother, testified that Father told her that Beltran's behavior had changed approximately two months before the killing. According to Father, Beltran thought that people were talking about him and showed signs of paranoia, claimed he saw elves in the garden, heard voices, and became rude, aggressive and disrespectful. Father stated that he worried that Beltran may be taking "harder drugs."[6] Approximately 10 days before the killing, O.C. was at Father's apartment. Beltran barely greeted her, which was unusual, and went around slamming doors and acting very angry.

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4 "[A]n actual, though unreasonable, belief in the need for self-defense" serves to "reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide" because malice " 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand.' " (*People v. Rios* (2000) 23 Cal.4th 450, 461.)

5 " 'A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder.' " (*People v. Elmore* (2014) 59 Cal.4th 121, 133 (*Elmore*).)

6 Father knew that Beltran smoked marijuana.

ii. *Testimony by Beltran's Sister in Law*

According to Beltran's sister-in-law, who lived in the same household as Beltran for a period of time, Beltran's behavior started to change in 2014 after he was the victim of a shooting.[7] Beltran thought that people were "out to get" the family, and he once boarded up the windows in his mother's house. Beltran would check the doors and windows to make sure they were locked, said he thought people were outside the windows, and said people in the trees followed him home and were listening outside. The sister-in-law also heard Beltran say that he thought the television was talking to him. One time in a hotel room, Beltran wanted to lift up the mattress to see if anyone was underneath, and another time he acted strangely by opening up all the cabinets in the kitchen.

iii. *Testimony by Beltran's Mother*

Beltran's mother testified that Beltran started acting paranoid, fearful and edgy after the 2014 shooting. Beltran worked at a restaurant but was terminated because he thought other employees were urinating in the food he prepared. At home, Beltran walked back and forth and looked out the window, saying that someone was coming to kill them. Beltran told his mother he heard voices and that the television was talking to him. A few days before the killing, Beltran said that he was hearing voices.

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[7] The evidence at trial was that Beltran was a victim of a shooting in 2014 in which his stepfather was killed, his brother was shot four times, including in the eye, and Beltran was shot in the leg.

iv. *Testimony by Beltran's Stepgrandfather-in-Law and Mentor*

Beltran's stepgrandfather-in-law and mentor testified that Beltran seemed paranoid after the 2014 shooting, looking over his shoulder all the time. Beltran also said that the television was talking to him.

v. *Testimony by Urban Corps Employees*

Starting in May 2016, Beltran participated in the Urban Corps job training and educational program for at-risk youth. Beltran's supervisors at Urban Corps noticed a change in his behavior in September 2016. Beltran was previously a good and enthusiastic worker, but he began to seem depressed, would sometimes not respond when spoken to, or would take a long time to respond, and began to appear disheveled. The director of student services at Urban Corps noted that on September 27, 2016, Beltran seemed jittery and stressed out, and on October 5, 2016, he seemed "very flat."

For several days beginning October 7, 2016, Beltran acted very strange during morning group physical exercises. Specifically, Beltran stood during class with his eyes closed and his fists clenched, seeming agitated and angry. Because of his strange behavior, Beltran was sent to the human resources manager for a drug test on the morning of October 11, 2016, hours before he killed Father. Beltran told the human resources manager that he would fail the drug test because of marijuana use, and he was terminated from the Urban Corps program. During the meeting with the human resources manager, Beltran seemed blank and anxious.

b. *Beltran's Testimony About His Mental State*

Beltran testified at trial about his state of mind in the previous months and years, and also about his state of mind during the killing of Father.

According to Beltran, after the 2014 shooting, he began to worry that people were out to get him. He lost a job at a restaurant because he thought a coworker was spraying urine on vegetables. One time, he put wood over the windows at his mother's house because he thought people were trying to get inside. He would stay up all night with a samurai sword watching for intruders, and when he took walks at night he thought people were in the trees who wanted to "lure him in" with their noises. Beltran testified that he began hearing voices in 2016 about two months before he killed Father. He heard Father's voice like "telepathy" telling him to watch out because Father was going to get him. During his testimony, Beltran confirmed that he believed what he told Dr. Abrams about Father poisoning his food to make him feel sick and crazy, regurgitating food and then serving it to him, and injecting him with a mixture of heroin and feces.

As Beltran described his killing of Father, it began when Father returned to the apartment when Beltran was trying to pry a disc out of the DVD player by using a knife. Beltran heard Father say, in Spanish, "I got your kids right here." Beltran did not know what Father meant, but Beltran explained at trial, "obviously he knew that I had that in the back of my mind already." Beltran tried to move Father aside and proceed past him, but Father hit Beltran in the face, and Beltran fell against the wall. Father jumped on Beltran and continued hitting him. Beltran reacted by stabbing Father in the stomach with the knife. According to Beltran, he then "went into a frenzy" and stabbed Father

multiple times. Beltran stated that he was not trying to kill Father and did not want him to die, but he felt like Father was trying to kill him, and he was "just trying to feel safe." Although Father never said so directly, Beltran believed Father was trying to kill him because he was "trying to expose [Father] as being gay." Beltran did not remember running out of the apartment complex and then back inside the apartment, and he did not remember what he did with the knife.

Beltran admitted that in addition to smoking marijuana, he started taking methamphetamine in 2015 and 2016, which he claimed to use approximately twice a week. However, Beltran testified that he did not believe that his methamphetamine use was the reason he killed Father, but instead he killed Father because he thought Father was trying to kill him.

c. *Dr. Abrams's Testimony*

Dr. Abrams was hired by the defense to evaluate Beltran. Dr. Abrams met with Beltran three times, for a total of approximately five hours, in late October 2016, late November 2016, and late June 2017.

During the first interview, Beltran did not want to talk to Dr. Abrams.

During the second and third interviews, Dr. Abrams noticed that Beltran's mood seemed blunted and flat. Beltran told Dr. Abrams that Father had been trying to kill him, that Father had been injecting him with a mixture of heroin and feces, and that Father was poisoning his food. Beltran recounted to Dr. Abrams substantially the same version of the killing as he later described at trial, saying that he stabbed Father because he felt threatened by him. Beltran also told Dr. Abrams that he had visual hallucinations, heard

"magic" voices, and believed that people were after him. Dr. Abrams did not form the impression that Beltran was malingering. On the contrary, Dr. Abrams thought Beltran was trying to downplay the degree of his mental illness. Dr. Abrams explained that mentally ill people are able to give short answers that appear normal, but then will demonstrate their mental illness during extended conversations. Beltran was able to appear relatively normal for the first 20 minutes of speaking with him, but he then started to talk about his paranoid delusions. Dr. Abrams also observed "thought blocking" throughout his conversations with Beltran, which is when someone suddenly stops talking because they are responding to internal stimuli such as hallucinations. Thought blocking is a common symptom in people with schizophrenia.

Based on Dr. Abrams's conversations with Beltran, his review of statements by people who knew Beltran, and his consideration of the details of Beltran's attack on G.M., Dr. Abrams concluded that Beltran suffered from chronic schizophrenia as well as obvious problems with methamphetamine and marijuana use. Dr. Abrams explained that although methamphetamine use can cause psychotic symptoms that resemble paranoid schizophrenia, such as auditory hallucinations and paranoid delusions, the conditions are not identical. Methamphetamine users often understand that their methamphetamine use is causing hallucinations, whereas schizophrenics do not understand that they are mentally ill. Further, unlike schizophrenics, who become narrow and blunted in their emotions, methamphetamine users do not lose their "emotional livelihood." Based on all of the information available to him, Dr. Abrams concluded that Beltran's mental illness

was not solely attributable to methamphetamine use, although his mental illness could have been triggered by drug use in combination with other adverse life experiences.

During cross-examination, the People elicited testimony from Dr. Abrams about the observations and reports of other mental health professionals who interacted with Beltran in jail after his arrest.

Two of those doctors testified during the People's rebuttal case: Dr. Kathryn Langham and Dr. Jonathon Howlett. Dr. Langham met with Beltran in jail on October 21, 2016, when he was in the general jail population. During that meeting, Beltran denied any auditory or visual hallucinations, paranoia or delusional thoughts, and his thought process was intact and linear, although he was restless and fidgety. Dr. Langham diagnosed Beltran with antisocial personality disorder, combination drug dependence and adjustive disorder with anxiety. She made no diagnosis of schizophrenia or other psychosis.

Dr. Howlett spoke remotely with Beltran by video conference on November 30 and December 7, 2016. The purpose of the interaction was for Dr. Howlett to manage Beltran's anti-anxiety medication. Dr. Howlett did not observe any abnormal thought process or evidence of psychosis in Beltran, such as hallucinations, delusions or disorganized speech.

Two of the other mental health professionals who evaluated Beltran in jail and whom Dr. Abrams was asked about on cross-examination did not testify at trial: Dr. Michael Monroe and Dr. Daniel Brockett. As related in Dr. Abrams's cross-examination testimony, Dr. Monroe is a psychologist who evaluated Beltran several

times while Beltran was still in either a safety cell or enhanced observation housing, on October 13, 14, 17 and 19, 2016. Dr. Monroe's October 13, 2016 report stated that Beltran had an adjustment disorder and problems with a parent-child relationship. Dr. Monroe's October 14, 2016 report stated that Beltran "was not suffering from internal stimuli," such as hallucinations or paranoia, and there were "no indications of psychosis."[8] Dr. Abrams also confirmed that Dr. Monroe's October 17, and October 19, 2016 reports contained no mention of schizophrenia. Dr. Abrams was generally critical of the professional abilities of Dr. Monroe, whom he was acquainted with through their work together in the jail. Dr. Abrams stated that Dr. Monroe is responsible for clearing inmates out of safety cells, had not worked as a clinician in "many, many years," and he "spends very little time with inmates and makes very rash judgments."

Dr. Brockett is a psychiatrist who spoke with Beltran on October 15, 2016. According to Dr. Abrams's testimony on cross-examination, Dr. Brockett's report did not indicate how long he met with Beltran, but he diagnosed Beltran with antisocial personality disorder and combination drug dependence. Dr. Abrams testified that he believed that Dr. Brockett had based his diagnosis of antisocial personality disorder on records available to him showing that Beltran had a criminal history. As Dr. Abrams testified, it appeared that Dr. Brockett was "diagnosing everybody with antisocial

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8 Dr. Abrams questioned Dr. Monroe's observation of lack of psychosis based on another note in Beltran's file from October 12, 2016, which indicated that Beltran stated "I murdered someone I didn't know. I think he died." Dr. Abrams stated that this statement by Beltran, who had killed his father, should have warranted further inquiry by Dr. Monroe about whether something was wrong with Beltran's thought content.

personality disorder who's in jail or prison," and concluded, "well, if you've been arrested before, you're antisocial personality disorder." Based on his own evaluation, Dr. Abrams did not believe that Beltran suffered from antisocial personality disorder, as most of Beltran's criminal history was based on drug use or possession, which does not satisfy the criteria for that disorder, and "most people described [Beltran] as a good kid, and he described himself as a hard-working person."

2. *The Jury Verdict, Post-Trial Motion, and Sentencing*

The jury convicted Beltran of first degree murder (§ 187) and elder abuse with force likely to produce great bodily injury or death (§ 368, subd. (b)(1)), along with making a true finding on the weapon allegation (§ 12022, subd. (b)(1)).

Beltran filed a motion to modify the conviction to second degree murder, which the trial court denied.

The trial court sentenced Beltran to prison for an indeterminate term of 25 years to life, and a determinate term of four years.

II.

DISCUSSION

A. *The Erroneous Admission of Hearsay Evidence Regarding the Observations and Reports of Drs. Monroe and Brockett Was Not Prejudicial*

We first consider Beltran's contention that the trial court prejudicially erred by allowing Dr. Abrams to testify on cross-examination about Dr. Monroe's and Dr. Brockett's reports about Beltran while he was in a safety cell or enhanced observation

housing. As Beltran contends, the evidence constituted inadmissible testimonial hearsay, and accordingly its admission violated his constitutional right to confrontation.

1. *The Issue Was Sufficiently Preserved for Review*

The People do not dispute that Beltran adequately preserved his objection to Dr. Abrams's testimony relating hearsay statements by Dr. Monroe and Dr. Brockett. The People acknowledge in their appellate brief that based on an in limine discussion with the trial court, defense counsel "had a standing objection to any hearsay statements unless the person who made the statement was going to be called as a witness." During cross-examination of Dr. Abrams, defense counsel raised an objection when the People elicited testimony about the reports of other doctors. In a sidebar conference, the People agreed that they would not elicit hearsay evidence regarding other doctors unless those doctors would be testifying during the People's rebuttal case. Nevertheless, the People proceeded to elicit testimony from Dr. Abrams about Dr. Monroe's and Dr. Brockett's reports, although neither of those doctors ended up testifying at trial. Based on the admission of that evidence, defense counsel brought a motion for a mistrial after both sides rested on the ground that Beltran's constitutional right to confrontation was violated. The trial court denied the motion but agreed to instruct the jury to consider the evidence "only for the limited purpose of showing . . . the type of information which Dr. Abrams considered when forming his opinion" and "not . . . as evidence of the truth of Dr. Brockett and Monroe's observations, conclusions or opinions".

2. *The Statements in Dr. Monroes's and Dr. Brockett's Reports Were Inadmissible Hearsay*

Turning to the merits, the People concede that Drs. Monroe's and Brockett's observations and reports about Beltran constituted hearsay evidence that should not have been admitted into evidence through Dr. Abrams's testimony. However, the People contend that the error did not violate Beltran's constitutional right to confrontation and was not prejudicial.

The admissibility of the evidence at issue here is governed by our Supreme Court's opinion in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).[9] *Sanchez* held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Id.* at p. 686.) Thus, although an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so" (*id.* at p. 685), an expert may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are

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9 The trial court observed in a sidebar conference during Dr. Abrams's cross-examination that *Sanchez* was a relatively new opinion that significantly changed the rules for admissibility of hearsay evidence during expert testimony, and "we're all trying to find our way around it."

covered by a hearsay exception."[10] (*Id.* at p. 686.) Further, "[i]f the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Ibid*.)

Although *Sanchez* specifically addressed a situation in which a *prosecution expert* relates hearsay during *direct examination*, in *People v. Malik* (2017) 16 Cal.App.5th 587 (*Malik*), the court held that the same principles set forth in *Sanchez* apply when a *defense expert* relates hearsay during *cross-examination* by the People. *Malik* acknowledged that the scope of permitted cross-examination of an expert witness is generally broad. "Generally, 'a witness testifying as an expert . . . may be fully cross-examined as to . . . the matter upon which his or her opinion is based and the reasons for his or her opinion.' (Evid. Code, § 721, subd. (a).) 'The scope of cross-examination of an expert witness is especially broad. [Citation.] Evidence that is inadmissible on direct examination may be used to test an expert's credibility, though the court must exercise its discretion under Evidence Code section 352 to limit the evidence to its proper uses.' (*People v. Gonzales* (2011) 51 Cal.4th 894, 923.)" (*Malik*, at p. 597.) However, *Malik* explained, "[W]e have found no authority standing for the proposition that the breadth of permissible cross-examination extends to the admission of case-specific testimonial

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10 "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) They do not include "an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (*Id.* at p. 685.)

hearsay in violation of a defendant's right of confrontation. While this case arguably represents the flip side of *Sanchez, supra,* 63 Cal.4th 665, as in that case, [the expert witness] was asked to treat the challenged statements in the police's and sheriff's reports as true. Indeed, if they were not true, the statements would have no impeaching value. The statements were then used, not to support, but to undermine, her opinion. We conclude the reasoning of *Sanchez* applies equally in these circumstances. The Attorney General does not argue otherwise." (*Malik,* at pp. 597-598.)

Although the People point out that we are not bound to follow *Malik*'s holding, the People here do not criticize or call into question the soundness of *Malik*'s conclusion that *Sanchez*'s holding making it impermissible to introduce case-specific hearsay during a prosecution expert's testimony also applies to case-specific hearsay introduced by the People through cross-examination of a defense expert. Having been presented with no reason to question the soundness of *Malik*'s analysis, we will follow *Malik*'s holding and will apply our Supreme Court's holding in *Sanchez* in assessing whether the trial court improperly and prejudicially allowed the introduction of case-specific hearsay during the People's cross-examination of Dr. Abrams.

Here, the parties do not dispute that the statements made in Dr. Monroe's and Dr. Brockett's reports, as related during Dr. Abrams's cross-examination, were out-of-court statements that were elicited to establish the truth of the observations and diagnoses set forth in the reports so that the jury could use them to assess the validity of Dr. Abrams's opinions and conclusions about Beltran's mental condition. Accordingly

the statements contained in Dr. Monroe's and Dr. Brockett's reports constitute case specific hearsay and should not have been admitted.[11]

3. *The Statements in Dr. Monroe's and Dr. Brockett's Reports Were Not Testimonial*

The disagreement in this case is on whether the erroneously admitted hearsay was *testimonial*. This distinction is important because, as made clear in *Sanchez*, whether the erroneous admission of the hearsay evidence through expert witness testimony violates a defendant's constitutional right to confrontation depends on whether the hearsay evidence was *testimonial*. (*Sanchez*, *supra*, 63 Cal.4th at p. 685 [only when an expert "relies upon, and relates as true, a *testimonial* statement would the fact asserted as true have to be independently proven to satisfy the Sixth Amendment"].)

"The confrontation clause of the Sixth Amendment to the federal Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be

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[11] Although the trial court instructed the jury that Dr. Abrams's testimony about Dr. Monroe and Dr. Brockett should not be "considered . . . as evidence of the truth of [those] observations, conclusions or opinions," the People acknowledge that the instruction was "erroneous." *Sanchez* rejected the fiction that a jury could view case specific hearsay evidence only for a limited purpose, explaining that "[o]nce we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) *Sanchez* specifically disapproved "prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*Id*. at p. 686, fn. 13.) As the People's appellate brief concedes, "Pursuant to the holdings in *Sanchez* and *Malik* . . . , respondent acknowledges evidence of the conclusions of the nontestifying doctors should not have been allowed, *even with the limiting instruction*." (Italics added.)

confronted with the witnesses against him.' In *Crawford* [*v. Washington* (2004) 541 U.S. 36 (*Crawford*)], the high court held that this guarantee bars the introduction of *testimonial* out-of-court statements offered for their truth unless (1) there is a showing that the declarant is unavailable and either (2) the defendant had a prior opportunity to cross-examine the declarant or (3) the defendant has forfeited his right to object through his own wrongdoing." (*People v. Garton* (2018) 4 Cal.5th 485, 505, italics added.)

In *People v. Lopez* (2012) 55 Cal.4th 569, 581, our Supreme Court surveyed the existing United States Supreme Court case law[12] to arrive at the following summary of the type of hearsay evidence that will be considered "testimonial" for the purpose of a Confrontation Clause analysis: "Although the high court has not agreed on a definition of 'testimonial,' a review of the . . . decisions indicates that a statement is testimonial when two critical components are present. [¶] First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity. . . . The degree of formality required, however, remains a subject of dispute in the United States

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12 Specifically, *Lopez* discussed the following cases: *Crawford*, *supra*, 541 U.S. 36 [the admission of the statement made by defendant's wife during a police interrogation violated defendant's Sixth Amendment right to confrontation]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [the admission of sworn certificates by laboratory analysts, which stated that material seized by police from the defendant's car was cocaine of a certain quantity, violated the defendant's Sixth Amendment right of confrontation]; *Bullcoming v. New Mexico* (2011) 564 U.S. 647 [a laboratory analyst's certificate stating the blood alcohol level of a sample taken from the defendant was not admissible without testimony from the analyst who tested the blood sample]; and *Williams v. Illinois* (2012) 567 U.S. 50 [defendant's constitutional right to confrontation was not violated when a police department forensic biologist testified about the results of a DNA analysis performed by an outside laboratory, which was then used by police to identify defendant as the rape perpetrator]. (*Lopez*, *supra*, 55 Cal.4th at p. 581.)

Supreme Court. [¶] Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be. For instance, in this year's *Williams* decision, Justice Alito's plurality opinion said that the Cellmark laboratory's report at issue was not testimonial because it had not been prepared 'for the primary purpose of *accusing a targeted individual*' . . . . Justice Thomas's concurring opinion criticized that standard, describing it as lacking 'any grounding in constitutional text, in history, or in logic.' . . . . Instead, for Justice Thomas, the pertinent inquiry is whether the statement was 'primarily intend[ed] to establish some fact with the understanding that [the] statement may be used in a criminal prosecution.' . . . And under the *Williams* dissent, the pertinent inquiry is whether the report was prepared 'for the primary purpose of establishing "past events potentially relevant to later criminal prosecution"—in other words, for the purpose of providing evidence.' " (*Lopez, supra*, 55 Cal.4th at pp. 581-582, citations omitted.)

Subsequently in a later case, *Ohio v. Clark* (2015) 576 U.S. __, 135 S.Ct. 2173, the majority opinion of the high court "clarified that 'a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial' [citation]—that is to say, unless the statements are given in the course of an interrogation or other conversation whose ' "primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." ' . . . Under this test, '[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law

enforcement officers.' . . . The court in *Ohio v. Clark*, however, 'decline[d] to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment.' . . . A court also considers the formality ' "of the situation and the interrogation" ' in determining the primary purpose of a challenged statement. . . . 'In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." ' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1214-1215 (*Rangel*).)

As *Sanchez* synthesized the case law, "[t]estimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 689.)

Given the circumstances surrounding the reports created by Dr. Monroe and Dr. Brockett, the statements at issue are not testimonial under the primary purpose test. As the evidence at trial established, Beltran was either in a safety cell or enhanced observation housing when he was evaluated by Dr. Monroe and Dr. Brockett on dates between October 13 and 19, 2016. Witnesses explained that placements in a safety cell or enhanced observation housing are for inmates who need to be observed more closely for their own safety or that of others, and to determine whether the inmates are in a mental state appropriate for releasing them into the general jail population. Accordingly, it appears that the primary purpose of Dr. Monroe's and Dr. Brockett's evaluations of

Beltran, which they memorialized in their corresponding reports, was to track Beltran's mental condition for safety reasons and to determine whether he was suitable to be released to the general population. There is no indication that either Dr. Monroe or Dr. Brockett performed any sort of in-depth evaluation or diagnosis of Beltran for use at trial or other court proceeding. The statements accordingly were not "testimonial" because they were not "made 'with a primary purpose of creating an out-of-court substitute for trial testimony.' " (*Sanchez, supra*, 63 Cal.4th at p. 688.)

Beltran argues that the reports from Dr. Monroe and Dr. Brockett should be considered testimonial because "it defies both logic and common sense to conclude that following [Beltran's] arrest for the murder of his father the jail psychiatrists interviewing [Beltran] had no knowledge [Beltran] had just killed his father and had no reasonable idea their psychiatric reports *might in fact be available for use* at a subsequent murder trial." (Italics added.) This argument misses the mark because it does not address the primary purpose requirement. Although Dr. Monroe and Dr. Brockett might have understood that their observations about Beltran during his first days in jail could become relevant if his mental state at that time became an issue at trial, there is no reason to believe that the primary purpose of their reports was " 'to establish or prove past events potentially relevant to later criminal prosecution' " and to " ' 'creat[e] an out-of-court substitute for trial testimony." ' " (*Rangel, supra*, 62 Cal.4th at pp. 1214, 1215.)

4. *The Error Was Not Prejudicial*

Because the statements in Dr. Monroe's and Dr. Brockett's reports were not testimonial, the error in admitting those hearsay statements constituted an error of state

evidentiary law, not a federal constitutional error. (*Sanchez, supra*, 63 Cal.4th at p. 698 [if not pertaining to testimonial hearsay, "improper admission of hearsay [during expert testimony] may constitute state law statutory error"].) When assessing errors of state law in admitting hearsay evidence we evaluate whether it is " 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308.)

Here, the only possibly significant evidence contained in Dr. Monroe's and Dr. Brockett's reports that should not have been admitted under the state's hearsay law consists of the following: (1) Dr. Monroe's observations in his October 14, 2016 report that Beltran did not appear to be suffering "internal stimuli" at the time, such as hallucinations or paranoia, or any indication of psychosis; and (2) Dr. Brockett's statement on October 17, 2016, diagnosing Beltran with antisocial personality disorder and combination drug dependence. Beltran argues that in the absence of this evidence, he would have achieved a more favorable result at trial. Specifically, he asserts that without such evidence the jury would have been *more* likely to credit Dr. Abrams's diagnosis of chronic schizophrenia. In turn, if the jury found Dr. Abrams's diagnosis to be more credible, it may have been more likely to conclude that Beltran had a mental illness that led him to irrationally believe that he needed to defend himself against Father, supporting a verdict of voluntary manslaughter under an imperfect self-defense theory. In the alternative, Beltran contends that in the absence of the improperly admitted evidence, he would at least have been more likely to receive a verdict of second degree murder on the

ground that his mental illness precluded him from acting with premeditation and deliberation.

We reject the argument and conclude that it is not reasonably probable that Beltran would have received a more favorable result had the trial court excluded evidence of the statements in Dr. Monroe's and Dr. Brockett's reports.

With respect to Dr. Monroe's observation that Beltran did not appear to be suffering from hallucinations, paranoia or any other symptoms of psychosis on October 13, 2016, although that evidence may have some peripheral relevance to the issue of whether the jury should credit Dr. Abrams's diagnosis of chronic schizophrenia, the relevance is very slight. For one thing, Dr. Abrams explained that persons suffering from schizophrenia typically appear normal during limited interactions, as did Beltran during their meeting, and that only upon more in-depth conversations will the psychosis become apparent. There is no indication that Dr. Monroe engaged in a prolonged conversation with Beltran on October 13, 2016, which was Beltran's first full day in jail when he was still in a safety cell. Indeed, Dr. Abrams strongly criticized Dr. Monroe, explaining that he spends very little time with inmates and makes very rash judgments. Further, there was overwhelming evidence at trial from multiple people close to Beltran before the killing that Beltran suffered from symptoms of paranoia and psychosis, including Beltran's belief that the television was talking to him, that there were elves in the garden, and that people were outside the windows and in the trees looking at him. Beltran's delusional thinking was also shown by the fact that he attacked G.M. on the bus while calling him a "pervert," although he did not know G.M. and had no prior

interaction with him. In light of all the evidence of Beltran's delusional and paranoid mental state before the killing, it is unlikely that Dr. Monroe's observation on October 13, 2016, that Beltran did not appear to be suffering from internal stimuli or other indications of psychosis had any significant impact on the jury's evaluation of whether, as Dr. Abrams's concluded, Beltran suffers from chronic schizophrenia.[13]

Dr. Brockett's diagnosis of Beltran on October 17, 2016, as suffering from antisocial personality disorder and combination drug dependence similarly does not appear to have been particularly significant in light of the other evidence presented at trial.[14] First, as Dr. Abrams pointed out, there was no indication that Dr. Brockett conducted any kind of extended interview with Beltran, and Dr. Abrams believed that Dr. Brockett's diagnosis of antisocial personality disorder was based solely on Dr. Brockett's review of Beltran's criminal history. In addition, even had Dr. Brockett's diagnosis been excluded from evidence, the jury still would have heard evidence that Dr. Langham reached the same diagnosis a few days later (October 21, 2016), diagnosing

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[13] Further, it is not reasonably probable that the verdict was impacted by Dr. Monroe's observation that Beltran did not appear to be suffering from any sort of psychosis in jail because other properly admitted evidence showed that Beltran did not display any obvious signs of psychosis during his first weeks in jail. Specifically, Dr. Langham, who interacted with Beltran on October 21, 2016, and Dr. Howlett, who interacted with Beltran in November and December 2016, did not note any psychosis, hallucinations or internal stimuli. A nurse who assessed Beltran on October 12, 2016, did not have any concerns about mental illness. An emergency room doctor who saw Beltran on October 23, 2016 found his affect "appropriate."

[14] Dr. Brockett's diagnosis of multiple drug dependence could not have been evidence prejudicial to Beltran because Dr. Abrams also reached that diagnosis, concluding that Beltran had problems with the use of marijuana and methamphetamine.

Beltran with antisocial personality disorder and combination drug dependence. Further, as Dr. Abrams suspected was the case with Dr. Brockett's diagnosis, Dr. Langham explained that her diagnosis was based solely on Beltran's jail records. In light of Dr. Langham's diagnosis of antisocial personality disorder based on Beltran's jail records a few days after Dr. Brockett reached the same diagnosis, we cannot conclude that it is reasonably probable that the jury would have reached a more favorable result for Beltran had it not also learned of Dr. Brockett's diagnosis.

B. *The Trial Court Did Not Prejudicially Err in Failing to Instruct on Involuntary Manslaughter*

We next consider Beltran's contention that the trial court prejudicially erred because it did not instruct the jury on the lesser included offense of involuntary manslaughter.[15]

" 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' . . . That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' . . . 'To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.' . . . [¶] . . . 'This substantial evidence

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15 Although there is no record of a request by defense counsel, while discussing jury instructions with counsel, the trial court concluded it would not instruct on involuntary manslaughter, explaining that "there's simply no way to get to involuntary manslaughter."

requirement is not satisfied by " '*any* evidence . . . no matter how weak,' " but rather by evidence from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." . . . "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." ' " (*People v. Souza* (2012) 54 Cal.4th 90, 115-116, citations omitted.)

The theory of involuntary manslaughter that Beltran contends was warranted by the evidence here is described in *People v. Brothers* (2015) 236 Cal.App.4th 24 (*Brothers*). Under that theory, a defendant is guilty of involuntary manslaughter when he or she commits a killing, without malice, during an inherently dangerous assaultive felony. (*Id*. at pp. 33-35.)

Before turning to *Brothers*, we begin with some necessary background discussion. Manslaughter is defined by statute as "the unlawful killing of a human being *without malice*." (§ 192, italics added.) Further, involuntary manslaughter is defined as an unlawful killing "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) In *People v. Bryant* (2013) 56 Cal.4th 959, 970 (*Bryant*), our Supreme Court explained that although the Penal Code does not specify the type of manslaughter committed when a defendant kills without malice during an inherently dangerous assaultive felony, such a killing is *not* voluntary

manslaughter.[16] Because review was not granted on the issue, *Bryant* expressly declined to address whether a killing without malice during an inherently dangerous felony could support a conviction for *involuntary* manslaughter. (*Bryant*, *supra*, 56 Cal.4th at pp. 970-971.) However, Justice Kennard's concurrence undertook an analysis and concluded that a defendant who kills unlawfully during an assault with a deadly weapon, but without malice, may be found guilty of involuntary manslaughter. (*Bryant*, at pp. 971-974, Kennard, J., concurring.)

Brothers directly considered the issue not reached by *Bryant* but addressed in Justice Kennard's concurrence. Agreeing with Justice Kennard, *Brothers* explained, "if an unlawful killing in the course of an inherently dangerous assaultive felony without malice must be manslaughter . . . and the offense is not voluntary manslaughter . . . , the necessary implication of the majority's decision in *Bryant* is that the offense is involuntary manslaughter. Accordingly, an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony." (*Brothers*, *supra*, 236 Cal.App.4th at pp. 33-

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16 As *Bryant* explained, voluntary manslaughter exists only when the defendant acts *with malice*, but the malice is legally *negated* by imperfect self-defense or provocation. (*Bryant*, *supra*, 56 Cal.4th at pp. 968-970.) Thus, a killing committed *without* malice during an inherent dangerous assaultive felony cannot be classified as voluntary manslaughter because there is no malice to negate. As *Bryant* also pointed out, a killing without malice during an inherently dangerous assaultive felony is not murder under the felony murder rule because of the "merger doctrine" which excepts assaultive felonies from the felony murder rule. (*Bryant*, at p. 966, citing *People v. Chun* (2009) 45 Cal.4th 1172, 1200.)

34.) *Brothers* cautioned, however, "when, as here, the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter. . . . Otherwise, an involuntary manslaughter instruction would be required in every implied malice case regardless of the evidence. We do not believe that is what the Supreme Court intended in *Bryant.*" (*Id*. at p. 35.)

Beltran was entitled to an instruction on involuntary manslaughter pursuant to *Brothers* only if a rational jury could entertain a reasonable doubt that Father's killing, although occurring during a brutal stabbing, was accomplished without implied malice. (*Brothers*, *supra*, 236 Cal.App.4th at pp. 33-34.) "Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger." (*Elmore*, *supra*, 59 Cal.4th at p. 133.) Here, there was no evidence from which a reasonable juror could have entertained a reasonable doubt that Beltran acted in conscious disregard of the risk of death that his repeated stabbing of Father's torso posed to Father's life. Beltran's own account of the incident showed he engaged in a deliberate and deadly assault on Father to protect himself from Father, who Beltran believed was trying to kill him. Although Beltran testified he did not intend to kill Father, there was no evidence that he did not subjectively appreciate the danger his repeated stabbing of Father's torso posed to

Father's life. Specifically, Beltran made no claim that he was unaware of what he was doing, that he stabbed Father accidentally, or that he failed to realize that stabbing someone in the torso is a dangerous act. Instead, Beltran stated that he stabbed Father because he wanted to "feel safe," showing he recognized that stabbing Father was a way to neutralize whatever threat he perceived. As in *Brothers*, where the court concluded that no involuntary manslaughter was warranted, here " '[t]here was no evidence of an accidental killing, gross negligence or [the defendant's] own lack of subjective understanding of the risk to [the victim's] life that [his] conduct posed.' " (*Brothers*, *supra*, 236 Cal.App.4th at p. 34.)

Beltran argues that based on his mental illness, as diagnosed by Dr. Abrams, the jury could have concluded that he acted without malice in stabbing Father. In broad terms, without citing any specific evidence, Beltran argues the jury could have found that he "killed his father without malice aforethought due to his mental problems." We reject the argument because neither Dr. Abrams's testimony, nor any of the other evidence concerning Beltran's mental condition, supports a finding that, because of his mental condition, Beltran may have been unable to appreciate that repeatedly stabbing Father was a dangerous act that could cause Father's death. Beltran may have been paranoid and may have had delusions about Father trying to kill him, but nothing suggests that Beltran was unable to understand the harm that could be caused by stabbing someone 26 times and directing most of those stabs to the victim's torso.

In short, because Beltran "indisputably . . . deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life" and

"no material issue is presented as to whether [Beltran] subjectively appreciated the danger to human life his . . . conduct posed," the trial court had no duty to instruct the jury on involuntary manslaughter. (*Brothers, supra*, 236 Cal.App.4th at p. 35.)

C. *The Trial Court Did Not Err in Denying the Motion to Modify the Conviction to Second Degree Murder*

After the verdict, Beltran filed a motion to reduce the first degree murder conviction to second degree murder pursuant to section 1181, subdivision (6), which the trial court denied. Under that provision "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial . . . ." (§ 1181, subd. (6).)

In ruling on a motion under section 1181, subdivision (6), the trial court "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' . . . If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to the . . . evidence.' . . . In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133, citations omitted.) Although, in reviewing the motion, the trial court must weigh the evidence independently, "[i]t is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. . . . [¶] A trial court has broad discretion in ruling on [the motion] and there is a strong presumption that it properly exercised that discretion. ' "The

determination of [the motion] rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Davis* (1995) 10 Cal.4th 463, 523-524 (*Davis*).) In contrast, when a trial court considers a motion for a judgment of acquittal under section 1181.1, the court applies a much more deferential legal standard, under which "[i]f there is *any substantial evidence*, including all inferences reasonably drawn from the evidence, to support the elements of the offense, the court must deny the motion." (*Porter*, at p. 132, italics added.)

Beltran's motion correctly set forth the applicable law, explaining that "[i]t is the trial court's function to determine independently whether it is satisfied that there is sufficient credible evidence to sustain the verdict" and that "[t]he trial court has broad discretion in determining whether the evidence has sufficient probative value to sustain the verdict." Applying this standard, Beltran argued "there was no evidence of premeditation and deliberation in support of a first degree murder conviction." The People's opposition briefing also set forth the correct legal standard and argued that "there is ample credible evidence to sustain the jury's First Degree Murder verdict." The People cited case law holding that the trial court " 'should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' "

At the hearing on the motion, the trial court was inexact in describing the applicable legal standard. The trial court twice referred to whether *sufficient evidence* supported the verdict, and twice referred whether *substantial evidence* supported the

verdict. The prosecutor also referred to a *substantial evidence* standard. Specifically, the trial court opened up the discussion with the following comment: "Let me start with the request by defense to modify, seeking [that] the court . . . indulge its discretion under the Penal Code to reduce the first-degree murder to second-degree murder. Defense argues this should be done because there was *insufficient evidence* to support the first-degree murder, and therefore under 1181[, subdivision] (6), the court should reduce the verdict." (Italics added.) Defense counsel stated that she would submit based on her motion papers. The prosecutor stated that she would also submit on the papers, but added, "I did file a motion in opposition to the defense, and our position is that there is *substantial evidence* to support the jury's verdict and that it should not be modified." (Italics added.) The trial court then made the following ruling: "The issue under 1181[, subdivision] (6) is whether or not there is *substantial evidence* for the verdict. The court finds under the circumstances, there was *sufficient evidence* to support the verdict. There was the build up to the event. There was the noises heard by the people outside the apartment. There was decedent saying words to the effect of, No, son, no. We have [Beltran] leaving the apartment then going back in." (Italics added.) The court concluded, "The court finds there was *substantial evidence* on which a jury could base its verdict; therefore, the motion to reduce the verdict is denied." (Italics added.)

Beltran argues that "in ruling on appellant's motion to reduce the verdict, the trial court misperceived the applicable standard and denied the motion by erroneously applying a Penal Code section 1118.1 standard [applicable to a motion for a judgment of acquittal] rather than the proper independent judgment standard. For example, the trial

court framed the issue it was [deciding] as 'whether or not there is substantial evidence for the verdict.' The trial court further found there was 'sufficient evidence to support the verdict,' and concluded 'there was substantial evidence on which a jury could base its verdict; therefore, the motion to reduce the verdict is denied.' "

In *Davis*, our Supreme Court considered and rejected an argument similar to Beltran's. In *Davis*, the defendant made a motion requesting that the trial court reduce his conviction to second degree murder from a first degree murder verdict based on premeditation and deliberation, attempted robbery, and kidnapping. (*Davis*, *supra*, 10 Cal.4th at p. 523.) The defendant contended that certain statements in the trial court's ruling "indicate[d] use of an improper standard of review." (*Ibid*.) Specifically, the trial court in *Davis* stated, " 'The Jury did reach a result and the question is: Is the result that they reached supported by the circumstantial evidence and inferences that could be made or are those inferences also really not inferences and the Jury just speculated because they thought they didn't like the defendant, they thought it was a horrendous crime.' " (*Ibid*.) On kidnapping and sodomy charges, the trial court stated: " 'the court feels there was sufficient evidence to support the verdicts on those counts.' " On the kidnapping charge, the trial court stated: " 'And I think the evidence supports that, and I think the jury finding of that [is] supported by the evidence, and . . . , I think that the Court or jury was adequately instructed as to all of the law that applied to the case. [¶] I think that the jury applied the law to the facts and I am not at this time prepared to set aside any of the conclusions that they made . . . .' " (*Ibid*.) On appeal, the defendant in *Davis* "contend[ed] that these statements show that the trial court's exclusive focus was on

evidence sufficient to support the *jury's* finding, not on independent review of the evidence," but our Supreme Court concluded the argument was "meritless." (*Ibid*.) *Davis* explained that based on its review of the record, "the trial court independently determined the credibility of the witnesses and the probative value of the evidence. Although defendant isolates statements in which the trial court refers to the jury's verdicts, it is clear from the record as a whole that it did not regard itself as bound by any of the jury's findings. [¶] Thus, on the issue of premeditation and deliberation, the trial court discussed the evidence in some detail and offered what were clearly its own independent conclusions." (*Id*. at p. 524.)

We reach the same conclusion here. Although the trial court twice used the term "substantial evidence," stating that "there was substantial evidence on which a jury could base its verdict," the trial court's statements, taken as a whole, indicate that it was independently reviewing the evidence and understood its role in ruling on the motion under section 1181, subdivision (6). Specifically, the trial court reviewed the pertinent facts showing premeditation and deliberation, including the "build up to the event," the noises heard by witnesses, Father's statement of "No, son, no," and Beltran leaving the apartment and then deciding to go back in. This discussion of the evidence by the trial court shows that the trial court independently reviewed and considered the issue of whether the evidence at trial supported a finding of premeditation and deliberation.

Beltran contends that this case is like *People v. Watts* (2018) 22 Cal.App.5th 102, 110-113, which reversed a trial court's denial of a motion under section 1181, subdivision (6), concluding that the trial court "incorrectly articulated both the scope of

its discretion as well as the legal standard by which [defendant's] new trial motion should be judged." (*Id*. at p. 113.) In *Watts*, a review of the hearing transcript revealed "that the court repeatedly informed [defendant] it could not reweigh the evidence and that its only concern was whether the prosecution had presented sufficient evidence to present the matter to the jury." (*Ibid*.) Among other things, demonstrating that it misunderstood the proper legal standard, the trial court stated " 'My job . . . is not to retry the case in my head and do whatever you want me to do because you think the evidence wasn't sufficient enough for the jury. That's what they do on appeal. That's not what I do, okay.' " (*Id*. at p. 111.) *Watts* is inapposite because the record here contains no indication that the trial court believed it lacked the ability to reweigh the evidence or in any other respect misunderstood its role in ruling on a motion under section 1181, subdivision (6). Instead, as we have explained, the trial court properly approached the motion by reviewing the evidence and concluding that it supported a finding of premeditation of deliberation.

In sum, we conclude that the trial court did not abuse its discretion in denying the motion to reduce the verdict from first degree to second degree murder.

D. *The Abstract of Judgment Should Be Corrected to Reflect the Proper Penal Code Section for the Weapon Use Enhancement*

The jury made a true finding that Beltran personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1) with respect to the murder conviction in count 1. However, due to an apparent typographical error, the abstract of judgment specifies that the weapon use enhancement was pursuant to section 12022.1, subdivision (b)(1). Beltran asks us to order that the abstract of judgment

be corrected to reflect the accurate Penal Code section for the weapon use enhancement. The People agree that the error should be corrected.

We according direct that the trial court correct the abstract of judgment to state that the weapon use enhancement for count 1 was pursuant to section 12022, subdivision (b)(1).

DISPOSITION

This matter is remanded for the limited purpose of allowing the trial court to correct the abstract of judgment to reflect that the weapon use enhancement for count 1 was pursuant to Penal Code section 12022, subdivision (b)(1). In all other respects, the judgment is affirmed. The trial court shall forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.